IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE
FIRST APPEAL NO. 814 OF 1999
IN
MISC. APPLICATION NO. 97 OF 1998
AND
FIRST APPEAL NO. 573 OF 2000
IN
MISC. APPLICATION NO. 100 OF 1998

Shri Mohd. Mukim Gaus Mohammed

Adult, Occupation : Business,

R/o Gulam Ali Chawl, R.No.1,

Near Rajaram Chawl, Noori Road,

Hajuri Dargah, Wagle Estate,

Thane 400 604. ..Appellant
(Orig.Applicant)

V/s

Smt. Rahila Bano Mukim Shaikh

Adult, Occupation: Housewife,

R/o Sherkhan Chawl, Khat Iza

Manzil, Hajuri Dargah,Wagle

Estate, Thane-400 604 ..Respondent
(Orig.Applicant)

Mr. Rajesh S. Datar for appellant

Mrs. Aarti Bhide for respondent.

Coram : D.G. Deshpande, J.

Date : 17th February 2005

ORAL JUDGMENT

1 Heard the learned counsel for appellant and respondent.Respondent's advocate was appointed as amicus curiae. Both these appeals have been filed by the husband/father of minor children. Both of them arise out of common order dated 7/8/1999 passed by the III Additional District Judge,Thane.

2 Two miscellaneous applications were moved before the said Judge. Misc. Application No. 97 of 1998 was filed by the father against his wife/mother and Misc. Application No. 100 of 1998 was filed by the mother against the present appellant/father. Both the applications were under section 7 of Guardian and Wards Act 1890 for custody and guardianship of minor children. Both these applications were decided by a common judgment. Misc. Application No. 97 of 1998 was dismissed. Misc. Application No. 100 of 1998 was allowed and the mother was appointed as guardian of both the minor children. Therefore, appellant/husband has filed both these appeals.

3 The counsel for appellant/father contended that when the applications were filed before the lower court in the year 1998 both the minor children viz. Shamim and

Vasim were aged about 6 and 7 years respectively.On the date of applications they were residing with their mother and now they are residing with their mother and their age is 13 and 12 years. He contended that under the Mohamaden Act the father is a natural guardian and custodian of children, if the children are aged above 7 years and, therefore, he is now entitled for appointing as a guardian.

4 The learned counsel for appellant also contended that the husband is financially and mentally capable of looking after his children and to give them best education. The welfare of the children lies in giving custody to the father. Now, the father will have to decide about the career of his children by providing better education to the children which the wife is unable to do.

5 On the other hand the learned counsel for respondent/wife repeatedly urged that since the children are living with their mother for the last so many years, the children custodial guardianship should not be changed. She also contended that father has neglected in maintaining their children throughout the years and, therefore, custodial guardianship should not be entrusted to the father.

6 The learned counsel for appellant contended that mother was a psychic patient. But that aspect was not properly considered by the lower court and custody of the children was granted to the mother. As against this, the learned counsel for respondent/wife contended that appellant/husband was also psychic patient.

5 In view of this controversy, it has to be decided whether interference in the impugned order is necessary.

6 So far as mental status of appellant is concerned, in paragraph-9 of the impugned order, the lower court has observed that husband Mohammed Mukim examined Dr.Shrikant Joshi, Psychictrist . From his evidence, it is clear that he has examined and treated the wife/respondent Rahila Bano for acute psychosis i.e. mental disorder and concluded that because of attack of acute phychosis mind of patient was disturbed and he was not in a position to state whether such an ailment can be permanently cured. The learned counsel for respondent drew my attention to same paragraph of the impugned order wherein Dr.Joshi has clarified that the husband/appellant was also his patient and he was treated for depression. However, the lower court gave some concession to wife/respondent Rahila Bano and observed that

since she has understood the questions and gave rational answers and that she was fully recovered. The lower court has stated in its judgment that husband/appellant was suffering from depression.No concession was given to him because of his ability to face examination in chief and cross examination. No conclusion was drawn by the lower court that he was mentally fit and sound. Therefore, in any case, depression of the husband/appellant cannot come in a way to get custody of the children.

Secondly, as per the Mohamedan Law father alone is natural guardian of child and mother is only entitled to custody until he completes the age of 7 years. Therefore it will be clear that when the children were minors, the mother was given the custody but guardianship vests with the father always.It is a fact on record that by virtue of lower court's order in the year 1999 the mother got custody of the children, whether the order of lower court was wrong and right is now of no consequence because a period of six years is elapsed. From the date of order of the lower court, it is clear that mother/respondent enjoyed the custody of the children. There was nothing on record to suggest that the father was incompetent and incapable of looking after his children or there is any legal impediment in granting custodial guardianship of the children to the

father/appellant. He has no addiction to drinking, gambling has love and passion of his children. The appellant has shown his concern about his children by filing application and appeals in the courts. Therefore, in this background of the matters both these appeals are required to be allowed. Both the parents must get opportunity to share their love and passion upon the children and to provide them better facilities.For these reasons, I pass following order.

ORDER

Both these appeals are allowed.

The father/appellant is appointed as guardian of both the children viz. Shamim and Vasim from the date of this order.

The impugned order rejecting the father's application bearing Misc.Application No. 97/1998 is set aside and the order allowing the wife/respondent's application is also set aside.

The mother/respondent to hand over the custody of the children to the father within 4 weeks from today.

The mother will have access to the children in the same manner in which the father was having access.

There will be no order as to costs.

(D.G. Deshpande,J)